

TRAN (Migration) [2017] AATA 3141 (30 November 2017)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Minh Cuong Tran
CASE NUMBER:	1617622
DIBP REFERENCE(S):	CLF2013/93755
MEMBER:	Moir Brophy
DATE:	30 November 2017
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Statement made on 30 November 2017 at 3:28pm

CATCHWORDS

Migration – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – Whether the parties are in a genuine and continuing relationship – Evidence of separate finances – Nature of household not indicative of a genuine and ongoing relationship – Lack of evidence of ongoing commitment – Witness credibility – Significant inconsistencies in evidence – Lack of knowledge of significant events – Decision affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65, 359A, 359AA
Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, 801.221(2)(c)

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 13 October 2016 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 30 April 2013 on the basis of his relationship with his sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 because the delegate was not satisfied on the evidence before her that the parties were in a genuine and continuing relationship.
4. The applicant, Mr Minh Cuong Tran appeared before the Tribunal on 30 August 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor Ms Hoa Thuy Trang Dang and from the father of the visa applicant Mr Phuoc Trung Tieu and from the uncle and aunt of the visa applicant Mr Van Trung Tran and Ms Thi Phi Tran. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
5. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

7. *Background*

8. The applicant was born on 25 August 1988 in Vietnam. He has declared no previous relationships. His parents reside in Vietnam as does one brother and one sister.
9. The applicant first came to Australia on a student (TU 573) visa on 30 January 2009. The visa was current until 31 March 2013. The parties were married on 1 April 2013. On 30 April 2013 he lodged an application for a Partner (Temporary)(Class UK) Subclass 820) visa and a Partner (Residence)(Class BS) (Subclass 801) on the grounds of being in a spousal relationship with an Australian citizen Ms Hoa Thuy Trang Dang (the sponsor).
10. The applicant's sponsor was born in Vietnam on 1 January 1983. She came to Australia on 17 August 1994 as a refugee and became an Australian citizen on 9 April 1997. She was previously married to Ngoc Thanh Dinh in the period from 25 April 2002 to 27 December 2007. The sponsor sponsored her previous partner to Australia. Her parents and one sister reside in Australia.
11. The parties stated they met in 2011 at a mutual friend's birthday. They committed to a long term relationship in April 2012 when the applicant told the sponsor he loved her. The applicant proposed marriage on 25 August 2012 it being his 24th birthday. The parties were married on 1 April 2013.

12. A temporary visa (Subclass 820) was granted on 22 July 2014.
13. On 13 September 2016 the Department invited the applicant to provide further documentation to support his application for a Partner (Residence) visa (subclass 801). Additional time was requested. A response was received on 20 September 2016.
14. In the Record of Decision, dated 13 October 2016 a copy of which the applicant provided to the Tribunal, the delegate stated he was not able to be satisfied the nature of the household was that of a genuine spousal couple, or that there was a commitment by the visa applicant to a long term relationship with the sponsor.
15. Prior to the hearing the applicant provided documents to the Tribunal including but not limited to the following; copies of bank statements in the visa applicant's and sponsor's name, statutory declaration of the visa applicant's aunt, submission from the migration agent, copies of the will of the parents of the sponsor, copy of extract from company records, copy of the sponsor's superannuation noting the visa applicant as the beneficiary, car insurance certificate, various invoices.

16. *Tribunal Proceedings*

17. The issue in the present case is whether the applicant and his sponsoring spouse continue to be in a genuine and continuing relationship.
18. In making its findings, the Tribunal has considered the documents contained in the Department and Tribunal files as well as the oral evidence provided at the hearing by the applicant, her sponsor and the witness and the submissions received after the hearing.
19. There were a number of inconsistencies in the evidence given at the time of hearing and these inconsistencies were put to the parties following the hearing in accordance with section 359A of the Act. The Tribunal explained the relevance and the consequences of relying on that information. The discrepancies were as follows:
 - The visa applicant told the Tribunal that there was a business account in his name at the Commonwealth Bank and that both he and the sponsor were signatories to that account and both had access to the account. This was inconsistent with the evidence given by the sponsor that she did not have access to that account.
 - The visa applicant told the Tribunal that the wages of the sponsor are paid into an account in her name at the ANZ Bank and he is able to access that account. That was inconsistent with the evidence given by the sponsor that the visa applicant did not have access to her ANZ account.
 - The visa applicant told the Tribunal he had proposed to the sponsor on 25 August 2012 and they were at a cinema in Parramatta at the time seeing a Kung Fu movie. This was inconsistent with the evidence given by the sponsor that the visa applicant had proposed to her on 25 August 2012 which was his birthday and they had been at an Asian restaurant in Cabramatta when he proposed.
 - The visa applicant said he had dinner at home the night before the hearing with the sponsor and the sponsor cooked rice and meat and soup with noodles. This was not consistent with the evidence of the sponsor who said the auntie had cooked rice and chicken for dinner. The father of the visa applicant said he and the visa applicant had gone out for dinner the night before the hearing and they had rice with beef stir fry and mushrooms. He said the visa applicant's mother had not accompanied them as she was not well. The sponsor had stayed at home with his brother in law and his

sister had been at work. This was not consistent with the evidence of the uncle of the visa applicant who had said he had worked late the previous evening and the family had eaten when he got home and he had rice with shrimp soup. This was not consistent with the evidence of the aunt of the visa applicant who said the family had soup and fried rice for dinner the previous evening but she was not home for dinner as she did not get home until around midnight and that she ate dinner by herself when she got home.

- The visa applicant told the Tribunal that for the sponsor's last birthday they had shared a celebratory meal with his aunt and uncle. This was not consistent with the evidence of the sponsor who said they had gone for a buffet to either Bankstown or Macquarie. She could not recall which one.
 - The visa applicant told the Tribunal that the activities they undertook socially included eating out together and they would go either to a Vietnamese restaurant at Cabramatta or they would go to Westfield at Parramatta. This was not consistent with the evidence of the sponsor who told the Tribunal they would go to the city to eat Asian food or to Parramatta.
 - The visa applicant told the Tribunal he has an older sister living in Vietnam who has two sons. This was not consistent with the evidence of the sponsor who said the visa applicant had a sister in Vietnam who has a son and a daughter.
20. The visa applicant was given the opportunity to address those inconsistencies as outlined above. A further submission from the visa applicant was received at the Tribunal on 12 September 2017. Those submissions have been taken into account.
21. The evidence given by the visa applicant at the time of hearing was confused, conflicting and unconvincing. The Tribunal was concerned the visa applicant frequently sought to adjust his answers and sought wherever possible to evade giving an answer especially when the questions pertained to the party's personal circumstances, their families or their daily routines. The Tribunal did not consider it plausible that he could fail to remember pertinent details such as what the parties had done the previous weekend. The Tribunal was concerned the answers the visa applicant gave were deliberately vague in an attempt to not disclose any information he considered may be prejudicial to his claim. The lack of knowledge and the frequent shifting of evidence displayed by the visa applicant were not consistent with relationship the parties claimed to have. Whilst it is appreciated Tribunal proceedings can be very difficult for parties and this stress can of itself lead to some inconsistencies in the evidence given, the Tribunal is not satisfied the explanations given are sufficient to overcome the cumulative effect of the inconsistencies.
22. The cumulative effect of the inconsistencies coupled with the evasiveness of the visa applicant was such that the Tribunal did not consider him to be a credible witness. The Tribunal does not place significant weight on his evidence unless it is corroborated by reliable evidence from other sources.

CONSIDERATION OF CLAIMS AND EVIDENCE

Whether the parties are in a spouse or de facto relationship

23. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian

citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.

24. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a) - (d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

25. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. There is nothing in the information before the Tribunal to cast doubt on the validity of the parties' marriage on 1 April 2013 and it was not disputed by the delegate. Consequently, in the absence of any evidence to the contrary, the Tribunal finds that, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

26. Financial

27. At the time of hearing the visa applicant and the review applicant gave consistent evidence they were currently living at the home of the visa applicant's uncle and aunt. They have lived there since they married. Their evidence as to what they paid was consistent. They pay \$250 per week inclusive of utilities. The visa applicant pays this in cash each week.
28. At the time of hearing the visa applicant told the Tribunal he was a director of a cleaning company that operated out of Homebush. Both he and the sponsor were company directors. There was a business account at the Commonwealth bank in the name of the company. The visa applicant said both he and the visa applicant were signatories on that account but the sponsor said she did not have access to that account. He transferred \$500 per week into an ANZ account held in joint names. The sponsor told the Tribunal she worked as a machine operator for a company at Concord. She works five days per week and sometimes on weekends. She is paid \$870 after tax and those monies are electronically transferred into an account in her name and which only she can access.
29. Bank statements of the account held in joint names were not provided to the Tribunal. Statements were provided for the ANZ account in the name of the sponsor. The statements were corroborative of the evidence given by the sponsor of her pay going into that account and of it being used to pay off her outstanding car loan and the car insurance, credit cards and loan accounts. There were numerous direct debits from the account for these purposes. The bank statements for the account in the company names were indicative of both business and personal expenditure being paid from that account. There was no evidence the sponsor was able to or actually did access the funds in the business account.
30. On the evidence before the Tribunal, the Tribunal is not satisfied that at the time of application or at the time of decision the applicant and her sponsor had any shared financial responsibilities or had pooled their resources. While the accounts of the business were indicative of the business being relatively financially healthy there was no evidence the

sponsor received assistance with easing her financial commitments. The evidence was that she was responsible for repaying all her debts herself.

31. The Tribunal places considerable weight on this aspect of the relationship.

32. *Nature of the Household*

33. The parties gave consistent evidence they had resided together at their present address since they married on 1 April 2013. They reside together with the aunt and uncle of the visa applicant.
34. At the time of hearing the parties gave consistent evidence they share the housework. The sponsor does the majority of the cooking and the grocery shopping. The visa applicant does the washing.
35. The Tribunal accepts the parties reside as part of the one household. However the Tribunal was not convinced on the evidence the parties were living together in a genuine relationship.
36. The evidence as to who ate dinner together the evening before the hearing and what they ate was indicative of a group of separate individuals residing at the one premises rather than a couple in a genuine and continuing relationship residing in a family home.
37. On the basis of the evidence I have placed weight on, I am not able to distinguish between a situation where the applicant and sponsor are living as a couple, or alternatively where they pay to stay at the home of the aunt and uncle until the outcome of the visa application is determined.

38. *Social Aspects of the Relationship*

39. At the time of application the visa applicant and his sponsor provided relationship statements from two aunts outlining the history and nature of the relationship. In material provided prior to hearing the parties provided a statutory declaration from a friend of the visa applicant attesting to the genuineness of their relationship. However that statement does not give any informed assessment as to why the author believes the relationship to be a genuine and continuing relationship.
40. The Tribunal accepts on the basis of the statements and the photographic evidence that the parties have socialised together with members of their immediate families and some mutual friends.
41. In considering the social aspects of the parties' relationship the Tribunal considered the visa applicant's travel to Vietnam in January/February 2013 and again in December 2015/January 2016. While the Tribunal considers it to be understandable the visa applicant would want to return to Vietnam to spend time with his family, the Tribunal does consider it significant that the visa applicant has travelled without the sponsor especially given the evidence she had not met his siblings.
42. The Tribunal has also considered the travel patterns of the sponsor and has noted that in the time the parties have been in a relationship she has travelled outside Australia on three occasions. While accepting that on one occasion she travelled to Vietnam with her mother for medical reasons the Tribunal does consider it significant that all her travels have been without the applicant.
43. After considering all the information regarding the social aspects of the parties' relationship, the Tribunal is satisfied their relationship is supported by the visa applicant's parents and his

aunt and uncle and some friends. The Tribunal is not satisfied the evidence of overseas travel supports the contention the parties are in a genuine relationship. The Tribunal is also not satisfied the parties have established that at the current time they present to the community at large as two people in a genuine relationship. In weighing all of the available evidence regarding the social aspects of the parties' relationship, I find it is not clearly indicative of whether the parties are, or are not, a couple in a close and genuine spousal relationship.

44. Nature of the persons commitment to each other

45. The evidence as to the parties commitment to each other was, when considered in its totality confused and unconvincing. There were a number of inconsistencies in the parties' oral evidence and these mainly related to financial, social and family issues. The lack of knowledge of those matters displayed by the parties was not indicative of a genuine and continuing relationship.
46. The confusion as to where the parties were at the time the visa applicant proposed to the sponsor was put to the visa applicant after the hearing in accordance with the requirements of section 359AA and the parties were given an opportunity to respond to the concerns raised. In the context of a much anticipated event such as a marriage proposal it is reasonable to expect the parties would remember the event with some specificity. The Tribunal does not regard it as plausible the parties would not remember such important details as to where the event took place. Conflicts in the evidence about such events are in the Tribunal's view either indicative of the event not taking place or it not taking place in the manner described.
47. The sponsor was not familiar with details of the visa applicant's family in Vietnam such as whether the children of his sister were boys or girls. Those inconsistencies in the evidence were put to the review applicant after the hearing in accordance with the requirements of section 359AA and the Tribunal has considered the explanations provided. It is not plausible that you would not know such details of your partner's family. The Tribunal was concerned there was a lack of candour in the giving of the evidence by both parties in an attempt to present their relationship as being a genuine and continuing relationship.
48. The confusion as to what the parties had for dinner the evening prior to the Tribunal hearing and who they had dinner with was of concern and the Tribunal has regarded this as being persuasive evidence of the parties not residing together in a genuine relationship. It is familiarity with the rituals of the household and the minutia of your partner's life that characterize genuine relationships.
49. The Tribunal regarded the cumulative effect of the inconsistencies in the evidence of the visa applicant as being indicative of the relationship not being characterised by a mutual commitment to a shared life together. The Tribunal places considerable weight on this evidence as it indicates either the parties do not communicate as claimed or they do not know each other as well as parties in a committed relationship would. When the inconsistencies are considered along with the lack of shared finances and the travel patterns of the visa applicant and sponsor the Tribunal is not satisfied the applicant and his sponsor provide one another with companionship and emotional support, or that they see the relationship as long-term. While the Tribunal acknowledges the parties reside at the same address the Tribunal is not satisfied they live together as a couple.
50. The Tribunal is not satisfied that the parties were, at the time of application, or are currently in a genuine relationship. The Tribunal is not satisfied on the evidence that the applicant and his sponsor are committed to a shared life as husband and wife to the exclusion of all others.

51. **CONCLUSION**

52. Given the above findings, the Tribunal is not satisfied that at the time the visa application was lodged and at the time of this decision the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. There is no evidence to establish the parties do not live together at the present time at the same residential address. I am however not convinced the applicant resides at this location in a committed relationship with the sponsor, rather than as an individual person who is not in a committed relationship.
53. Upon considering the overall evidence before me and on the basis of the findings I have made I am not satisfied the applicant has established he is currently living in a genuine and committed spousal relationship with the sponsor.
54. Given these findings the Tribunal, on balance, is not satisfied that at the time of this decision the parties are in a spousal relationship.
55. Therefore the applicant does not meet cl.801.221(2)(c).
56. Furthermore, the applicant has not claimed, and there is no evidence before the Tribunal, that the applicant meets the alternative criteria in cl.801.221 (2A), (3), (4), (5) or (6).
57. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

58. The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Moirá Brophy
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).